Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service	)	**ET Docket No. 95-18**

To: The Commission

COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

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Dated: February 3, 1999

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SUMMARY

The Commission rightfully has affirmed its prior conclusion that MSS providers and other new licensees in the 2.1 GHz band can and should be required to compensate incumbent licensees who are forced to relocate their systems to alternative spectrum. Without such protection, the critical private systems of API member companies and other Fixed Service licensees may suffer unnecessary disruptions or impaired reliability, thus endangering public safety and the environment.

API agrees with the Commission that the general relocation rules developed and implemented in the context of PCS deployment in the 1850-1990 MHz band can, for the most part, be applied in the present situation. Like with PCS deployment, a voluntary negotiation period should begin following adoption by the Commission of the applicable relocation rules, and the first licensee to require clearing of the spectrum should be expected to bear initial responsibility for relocating both halves of a paired Fixed Service frequency assignment. Further, allegations of bad faith during the mandatory negotiation period should be assessed on a case-by-case basis in accordance with the basic guidelines that have been established by the Commission. The Commission also should affirm that tax certificates will be available to 2.1 GHz incumbents as they are to 1.8 GHz microwave licensees.

At the same time, some minor modifications to the PCS relocation rules are warranted in light of certain circumstances that are unique to the 2.1 GHz band. For instance, API believes that the Commission should return to a two-year, rather than a one-year, voluntary negotiation period so as to allow the parties time to derive negotiation and relocation procedures that are appropriate here given the nationwide nature of MSS operations. Additionally, because MSS systems may not cause harmful interference to incumbent operations until after significant loading has occurred, the proposed ten-year sunset date on incumbents' reimbursement rights could enable many MSS licensees to avoid compensating incumbents by simply waiting out the sunset period.

As a final matter, API reminds the Commission that there are two sets of pending Petitions for Reconsideration in WT Docket No. 95-157 which seek amendment and/or clarification of various aspects of the existing rules governing the relocation of incumbent Fixed Service systems. Accordingly, API urges the Commission to rule as soon as possible on the issues covered by these pending petitions, including API's request that the Commission redefine "throughput" for purposes of assessing the comparability of replacement facilities and that it reconsider certain rules regarding the self-relocation of incumbent systems.

BEFORE THE

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Amendment of Section 2.106 of the	)	**ET Docket No. 95-18**
Commission's Rules to Allocate	)	
Spectrum at 2 GHz for Use by the	)	
Mobile-Satellite Service	)	

To: The Commission

COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"), by its attorneys, pursuant to the invitation extended by the Federal Communications Commission ("Commission") in its Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order ("Third NPRM"),[1/] in the above-captioned proceeding, respectfully submits the following Comments.

[1/] 63 Fed. Reg. 69606 (December 17, 1998).

I. PRELIMINARY STATEMENT

1. API is a national trade association representing approximately 300 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing and transportation of petroleum, petroleum products and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organization's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and federal proposals affecting telecommunications facilities used in the oil and gas industries.

2. API's Telecommunications Committee is supported and sustained by licensees that are authorized by the Commission to operate, among other telecommunications facilities, point-to-point and point-to-multipoint systems in the Fixed Microwave Service ("FS") that is governed by Part 101 of the Commission's Rules and Regulations. These telecommunications facilities are used to support the search for and production of oil and natural gas. Such systems also are utilized to ensure the safe pipeline transmission of natural gas, crude oil and refined petroleum products, and for the processing and refining of these energy sources, as well as for their ultimate delivery to

industrial, commercial and residential customers. The facilities licensed to API's members are therefore essential to the provision of our nation's energy sources.

3. API's members utilize private FS systems to serve a variety of vital point-to-point and point-to-multipoint telecommunications requirements, including communications between remote oil and gas exploration and production sites, for supervisory control and data acquisition ("SCADA") systems, to communicate with refineries, and to extend circuits to remote pipeline pump and compressor stations. The oil and gas industries were among the pioneers in the development of private microwave, utilizing their systems to monitor and operate petroleum and natural gas pipelines.

4. Accordingly, the API Telecommunications Committee participated in the Commission's earliest rule making proceeding that addressed private microwave use of the spectrum; and it has continued to be an active participant in every subsequent major proceeding affecting the FS. Consistent with this active involvement in telecommunications regulatory issues, the API Telecommunications Committee participated in nearly every phase of the Commission's Docket Nos. 90-314 and 92-9 that led to the reallocation of spectrum in the 2 GHz range for emerging technologies, including Personal Communications Service ("PCS"), and to the adoption of relocation and reimbursement provisions for those FS licensees required to vacate their assignments. API also has provided input in the earlier phases of the present docket, as well as the

Commission's ongoing "Microwave Relocation Cost-Sharing" proceeding (WT Docket No. 95-157).

II. COMMENTS

5. API applauds the Commission's decision to reaffirm the right of incumbent licensees in the FS and Broadcast Auxiliary Service ("BAS") to obtain relocation reimbursement from Mobile Satellite Service ("MSS") providers and other new licensees in the 2.1 GHz band. (Third NPRM at ¶ 13). As the Commission correctly has recognized, given "the importance of the functions performed by fixed microwave operations, such as public safety and utility management communications," it is necessary "to minimize the impact of spectrum redevelopment on those services." (Third NPRM at ¶ 23). API offers the following comments in an effort to ensure that the particular relocation and compensation policies adopted in this proceeding are appropriate in the context of MSS deployment and will adequately protect critical private FS systems from unnecessary and potentially dangerous disruptions.

A. Allocating Reimbursement Costs

6. The private FS systems implicated by this proceeding typically involve paired frequency assignments, with one transmitter operating in the 2130-2150 MHz band

(which has been redesignated for auction pursuant to the Balanced Budget Act of 1997) and the other operating in the 2180-2200 MHz band (reallocated as MSS downlink spectrum). The Commission properly notes that "[i]t is usually necessary to relocate both links of a two-way FS microwave system." (Third NPRM at ¶ 51). Indeed, this conclusion has been borne out time and again by the experience of FS relocations from the 1850-1990 MHz band to make way for PCS licensees. This is because microwave links are nearly always two-way paths and require a separation of at least 30 MHz between the transmit and receive frequencies in order to prevent "self interference." Therefore, since there is only 20 MHz of spectrum in either part of the 2.1 GHz band, both the upper and lower portions are necessary for operating point-to-point microwave systems. Moreover, it is highly impractical to use, for example, a 2.1 GHz transmit frequency paired with a 6 GHz receive frequency, since those frequencies are so far removed from one another as to require separate antennas and transmission lines. Transmitters operating at 6 GHz cannot use 2.1 GHz feedhorns and coaxial cable, and 2.1 GHz transmitters cannot use 6 GHz feedhorns and waveguide. Accordingly, API agrees with the Commission that the first new licensee to require relocation of a particular FS incumbent in the 2.1 GHz band (probably, but not necessarily, an MSS provider) should be expected to bear initial responsibility for relocating both halves of a paired frequency assignment.

7. API also supports adoption of the Commission's proposal that the costs of relocating FS systems ultimately should be allocated equally between MSS providers and other new licensees that subsequently initiate service in the 2.1 GHz band, rather than being subject to depreciation as in the PCS context. (Third NPRM at ¶ 51). Depreciating reimbursement under the circumstances presented here unfairly would penalize MSS licensees and any other potential early users of new 2.1 GHz assignments, while unjustly enriching subsequent licensees and discouraging prompt deployment of new services and the payment of adequate compensation to FS incumbents. Thus, the existing cost reimbursement formula should be modified in this instance to reflect an equal sharing of relocation costs.

B. The Voluntary Negotiation Period

8. The Commission has requested comment on whether it should apply a one-year voluntary negotiation period, followed by a one-year mandatory negotiation period, for non-public safety FS relocations from the 2.1 GHz band, as is presently the case for relocations from the C, D, E and F PCS blocks. (Third NPRM at ¶ 50). While API believes that a one-year mandatory negotiation period is reasonable, it strongly urges the Commission to allow two years for voluntary negotiations.

9. Unlike PCS, which is essentially a local service, MSS is a national service which will necessitate the relocation of FS incumbents on a nationwide basis. In

affirming the right of such incumbents to be compensated for their relocation costs by the MSS industry, the Commission notes that this will be a "large undertaking" and that "MSS licensees may be able to deal with many incumbents collectively, or use other techniques to minimize the difficulty of negotiating relocation." (Third NPRM at ¶ 26). Regardless of what procedures ultimately are adopted and implemented to address this situation, the negotiation process can be expected to differ significantly from PCS relocations and may well be more complex in certain respects due to the number of parties involved. Moreover, it likely will take some time -- perhaps a number of months -- before the new procedures for voluntary relocations are developed, tested, refined and, finally, agreed upon by interested parties. FS incumbents would have little opportunity to negotiate voluntary relocation agreements during a one-year period that is consumed primarily with such procedural matters. As a result, API believes that a two-year voluntary negotiation period will be more appropriate here.

10. With respect to when the voluntary negotiation period should commence, the Commission recognizes that, if it employs the date on which it began accepting applications for MSS licenses in the affected bands -- i.e., July 22, 1997 -- a one-year voluntary negotiation period will already have expired. (Third NPRM at ¶ 44).[2/] API believes that it would be unreasonable for the voluntary negotiation period to be deemed

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[2/] Even a two-year voluntary negotiation period, as proposed above by API, most likely will have expired before the Commission finalizes its relocation rules for the 2.1 GHz band if a July 1997 starting date were to be employed.

to have begun before the Commission even adopts final rules governing 2.1 GHz band relocations. The parties cannot be expected to conduct meaningful negotiations under a cloud of uncertainty regarding their respective rights and obligations. Therefore, API proposes that the onset of the voluntary period should be no sooner than the effective date of the 2.1 GHz band relocation rules to be adopted in this proceeding.[3/]

C. The Mandatory Negotiation Period

11. In discussing when the voluntary negotiation period should begin, the Commission seems to imply in its Third NPRM that a one-year mandatory negotiation period for 2.1 GHz band relocations would expire in all instances on a fixed date one year after the end of the voluntary negotiation period. (See Third NPRM at ¶ 44). This is not necessarily the case, however, under the existing relocation rules, nor should it be true with respect to the 2.1 GHz band. Rather, the mandatory period may be "triggered at the

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[3/] The Commission suggests that one relevant consideration regarding the start date of the voluntary period is the fact that the reallocation of the 1990-2025 MHz and 2165-2200 MHz bands to MSS is to be effective on January 1, 2000. (Third NPRM at ¶ 44). API firmly believes, however, that this factor should not in any way serve to limit the amount of time afforded for voluntary relocations or to provide the Commission with grounds for initiating the voluntary negotiation period prior to the adoption of relocation procedures in this proceeding. After all, MSS licensees have no absolute right to use this spectrum on an unfettered basis beginning on January 1, 2000; rather, any MSS operations will be subject to the protection of incumbents pursuant to the Commission's relocation policies and procedures, and at least some incumbent operations undoubtedly will be continuing beyond the year 2000, regardless of the date of onset of the voluntary negotiation period.

option of the [new] licensee" at any time after the voluntary period has expired. 47 C.F.R. § 101.73(a). Accordingly, it does not have a uniform start or end date, but may instead vary for each set of parties and negotiations. To avoid further confusion, API requests that the Commission clarify this point as part of its subsequent order setting forth the applicable relocation rules for the 2.1 GHz band.

12. Under the existing relocation rules, claims that a party has failed to negotiate in good faith during the mandatory negotiation period are assessed on a case-by-case basis under certain guidelines set forth in Section 101.73(b) of the Commission's Rules and Regulations. Because API believes that these guidelines have worked well with respect to PCS negotiations, API supports the Commission's proposal to apply the same guidelines in the present context. (Third NPRM at ¶ 49).

D. Tax Certificates Should Be Authorized

13. The Commission has restated its intention to generally provide for any necessary accommodation of incumbent licensees in accordance with its Emerging Technologies policies. (See Third NPRM at ¶ 47). In a Memorandum Opinion and Order adopted by the Commission in the Emerging Technologies proceeding, the agency authorized the grant of tax certificates for any sale or exchange of property in connection with agreements for the relocation of fixed microwave facilities that are entered during

either the voluntary or mandatory negotiation period.[4/] API believes that experience has demonstrated the wisdom of this policy and the validity of the Commission's conclusion that "tax certificates should be used as an incentive to encourage the early relocation of fixed microwave facilities."[5/] Accordingly, API urges the Commission to specifically provide for the issuance of tax certificates to those 2.1 GHz incumbents who reach relocation agreements with MSS or other new licensees during the voluntary or mandatory negotiation period.

E. The Proposed Sunset Provision

14. API urges the Commission not to adopt the proposed ten-year sunset period for FS relocations from the 2.1 GHz band. (See Third NPRM at ¶ 49). Microwave incumbents typically have purchased systems which last in terms of decades, not months and years; thus, many of these systems are capable of operating well beyond the ten-year sunset date. Further, it is API's understanding that MSS systems may not cause harmful interference to incumbent operations until after some significant loading of subscriber units has occurred. In joint comments filed with the Commission in this matter on May 17, 1996, the MSS Coalition's suggestion that "MSS and FS incumbents are expected to be able to share spectrum for several years"... (p. 12) is an apparent reflection of its conclusion that interference will not occur until there has been some

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[4/] 9 FCC Rcd 1943 (¶ 46); adopted March 8, 1994.

[5/] Id.

growth in the MSS subscriber base. This same observation has been reported to have been offered by an MSS representative at a meeting of the Telecommunications Industry Association's Joint Working Group TR 34/14. Under these circumstances, the implementation of a ten-year sunset period could create an incentive for MSS licensees simply to forego negotiations and wait out the sunset date, thereby delaying band clearing and requiring many FS incumbents to absorb the costs of relocating their critical microwave systems.

15. In lieu of the proposed ten-year sunset date, API believes that the Commission should either: (1) adopt a sunset period of at least fifteen years; or (2) initiate the ten-year sunset period at the onset of the involuntary relocation period, rather than the voluntary negotiation period. Either of these options would better reflect the useful life of incumbents' equipment and would encourage MSS licensees to enter negotiations with incumbents and seek prompt clearing of the 2.1 GHz band.

16. Finally, API notes that, although a ten-year sunset period for PCS relocations was adopted by the Commission in its "Microwave Relocation Cost-Sharing" proceeding, API sought reconsideration of that decision in a Petition that was timely filed on July 12, 1996 and that is still pending at the Commission.[6/] As further discussed

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[6/] A copy of API's first Petition for Reconsideration in WT Docket No. 95-157 is attached hereto as Exhibit A.

below, this Petition, as well as a subsequent (and also pending) "Petition for Reconsideration and Clarification" filed by API in the same docket,[7] requests reconsideration not only of the sunset period, but of a variety of aspects of the Commission's relocation rules.[8] Accordingly, if the Commission is to apply the existing relocation rules in the present context, it should minimize future ambiguity and confusion by addressing in this proceeding (preferably prior to the onset of the voluntary negotiation period) those pertinent issues which have been pending on reconsideration in WT Docket No. 95-157 for several years now.

F. Defining "Comparable Facilities"

17. The American petroleum and gas industries have developed some of the best private FS systems in the world for the safe and efficient discovery, production and delivery of energy resources. API member companies wish to maintain the high level of communications service which they have attained over the years. Their ability to do so, however, will be impeded unless the Commission ensures that the replacement facilities provided by MSS and other new licensees truly match the high standards and capabilities of existing 2.1 GHz facilities.

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[7] See Exhibit B.

[8] For example, this Petition also addressed inclusion of adjacent channel interference in the cost sharing plan, use of cost estimates in the voluntary negotiation period, and reimbursement of transaction and transition expenses.

18. Under the Commission's existing relocation rules, the replacement system provided to an incumbent pursuant to an involuntary relocation must be at least equivalent to the existing system with respect to three factors: throughput; reliability; and operating costs. 47 C.F.R. § 101.75(b). In the case of throughput -- the amount of information transferred within a system in a given amount of time -- the replacement system need only match the level of actual use of the prior system at the time of relocation, rather than the overall capacity of the system. See 47 C.F.R. § 101.75(b)(1).

19. In its first Petition for Reconsideration filed in WT Docket No. 97-157, API objected to this definition of throughput. See Exhibit A at 6-8. In particular, API pointed out that incumbents often purchase systems with reserve capacity to meet future needs and that, without such reserve capacity, replacement systems could be obsolete before they are even installed. As a result, incumbents could be required to bear the significant costs of a complete change-out of equipment -- costs which they have already borne once before in purchasing their 2 GHz systems. Because these concerns are equally relevant in the context of 2.1 GHz band relocations, API again urges the Commission to reconsider its definition of throughput.

G. Self-Relocation of Microwave Systems

20. The existing relocation rules provide that FS incumbents who relocate their own microwave links are entitled to obtain reimbursement, through the Commission's cost-sharing plan, from subsequent licensees who benefit from the clearing of the spectrum. The purpose behind this policy is to encourage system-wide relocations of incumbent microwave systems and the prompt deployment of new services -- worthy goals in the present context, as well as with regard to other spectrum bands that have been reallocated. Thus, the Commission should confirm that the option of self-relocation is available to FS incumbents in the 2.1 GHz band.

21. In the "Microwave Relocation Cost-Sharing" proceeding, API has sought reconsideration of certain aspects of the rules governing the self-relocation of incumbent microwave systems. (See Exhibit B.) Specifically, API has urged the Commission:

- to allow participation in the cost-sharing plan by FS incumbents who complete self-relocation prior to the effective date of the rules confirming the right to reimbursement for self-relocation costs;
- to permit cost recovery by FS incumbents who self-relocate to leased services, rather than purchasing new systems; and
- not to depreciate the cost-sharing rights of self-relocating incumbents.

The grounds for API's positions on these matters -- all of which remain applicable in the present docket -- are set forth in detail in Exhibit B. API further notes that it would be

particularly irrational and unfair to subject the reimbursement rights of 2.1 GHz band incumbents to depreciation if, as proposed here by the Commission, no such depreciation is to be applied with respect to cost-sharing among MSS and other new licensees.

III. CONCLUSION

22. Effective and reliable FS systems are critical to the efforts of API member companies to produce and transport petroleum, petroleum products and natural gas with the least possible risk to the public. Relocation to inferior communications systems could delay detection of abnormal conditions and emergency response operations, thereby imperiling public safety and the environment. In light of these circumstances, API appreciates the Commission's vigilance in reaffirming the reimbursement rights of FS incumbents who are relocated from the 2.1 GHz band.

23. To ensure that such relocations proceed in a manner that recognizes the realities of MSS deployment, minimizes disruptions to incumbent systems and adequately compensates incumbents for the costs of their replacement systems or services, API also requests that the Commission: (1) insist that the first new licensee requiring use of the spectrum bear initial responsibility for relocating both halves of a paired FS frequency assignment; (2) determine that the cost-sharing reimbursement rights of both new licensees and FS incumbents in the 2.1 GHz band should not be subject to

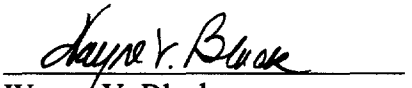
depreciation; (3) allow two years for voluntary negotiations, to begin following adoption by the Commission of relocation rules for the 2.1 GHz band; (4) make tax certificates available to 2.1 GHz incumbents that enter relocation agreements during the voluntary or mandatory negotiation period; (5) adopt either a fifteen-year sunset date or initiate a ten-year sunset period upon the onset of involuntary relocations; and (6) respond to the various relevant issues raised by API in its pending Petitions for Reconsideration in WT Docket No. 95-157, including the definition of "throughput" and several matters pertaining to the recovery rights of self-relocating FS incumbents.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing Comments and urges the Federal

Communications Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

THE AMERICAN PETROLEUM INSTITUTE

By: 

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Dated: February 3, 1999

EXHIBIT A

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's	)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing	)	
The Costs of Microwave Relocation	)	

To: The Commission

PETITION FOR RECONSIDERATION OF AMERICAN PETROLEUM INSTITUTE

AMERICAN PETROLEUM INSTITUTE

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SUMMARY

The American Petroleum Institute ("API") supports the Federal Communications Commission's ("Commission") decision to allow cost sharing among PCS licensees. API believes that the Commission should fine-tune its cost-sharing rules, however, so that adjacent channel interference is included in the cost-sharing plan. In addition, API requests the Commission not to require cost estimates during the voluntary negotiation period because an incumbent should remain free from obligation during this time.

API believes that the Commission's sunset provision will provide a disincentive for PCS licensee to relocate microwave incumbents as that date approaches. API urges the Commission to rescind this counterproductive deadline. API also opposes the Commission's definition of throughput because it will result in replacement systems with lower capacity than existing systems.

API urges the Commission to recognize that transaction expenses will be an integral part of most relocations. These transaction expenses should be reimbursed by the PCS licensee, up to a reasonable amount, regardless of when relocation occurs.

The Commission should proactively apply its new policy that requires stipulation of the one year trial period in the relocation contract. Otherwise, parties that contracted in reliance upon the Commission's previous policy would have their agreements unfairly impacted by this new policy.

Finally, the Commission should permit incumbents to recover the reasonable costs of operating on a transitional basis. Where appropriate, transition costs should be added to the reimbursement cap in an amount not to exceed $50,000 per link.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's Rules Regarding a Plan for Sharing The Costs of Microwave Relocation	)	WT Docket No. 95-157

To: The Commission

PETITION FOR RECONSIDERATION OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits this Petition for Reconsideration ("Petition") of rule amendments covered by the First Report and Order ("Order") and adopted by the Commission in this matter on April 25, 1996.[1/]

I. PETITION FOR RECONSIDERATION

1. The American Petroleum Institute ("API") enthusiastically supports the Commission's decision to permit cost sharing when more than one Personal Communications Service ("PCS") licensee benefits from the

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[1/] 61 Fed. Reg. 29679 (June 12, 1996).

relocation of a microwave link, but a single PCS licensee makes the initial payment for that relocation. API commends the Commission for adopting its cost-sharing proposal because it provides for a more equitable distribution of the relocation costs, and will facilitate systemwide relocation of incumbent microwave systems.

2. API also applauds the Commission for dismissing the unfounded allegations raised by PCS trade associations against microwave incumbents. Instead, the Commission focused on resolving the issues raised in its Notice and, in so doing, contributed to the advancement of PCS rollout and incumbent relocation. API submits this Petition for Reconsideration ("Petition") to request the Commission to fine-tune a few of its determinations so that the rules will work in a more efficient manner.

A. Conditions for Reimbursement

3. The Commission decided that a subsequent PCS licensee would be required to reimburse the PCS relocator only if (1) the subsequent PCS licensee's system would have caused co-channel interference to the link that was relocated; and (2) at least one end point of the former link was located within the subsequent PCS licensee's authorized

market area (MTA or BTA). API believes that the Commission should broaden this process to include adjacent channel interference and any subsequent PCS licensee that would have interfered with the microwave link if the link were still operational.

4. Limiting reimbursement to co-channel interference could lead to inequitable results because adjacent channel interference often presents a substantial problem. Inclusion of adjacent channel operators into the cost-sharing plan would enhance the ability of PCS relocators to recover the costs of systemwide relocations. This, in turn, could promote more broad-ranging negotiations between the relocator and a microwave incumbent.

5. Moreover, if the Commission adopts the proposal contained in its Notice to permit a microwave incumbent to self-relocate and participate in the cost-sharing plan, allowing cost recovery for adjacent channel interference would spur incumbent self-relocations. Conversely, an incumbent may be reluctant to self-relocate if it is unsure that a co-channel licensee would interfere; the presence of a cost-sharing mechanism for both co-channel and adjacent channel interference would enhance the incumbent's chances for some reimbursement.

6. The Commission permits PCS relocators that relocate a link outside of their geographic area or outside of their frequency block to obtain **full reimbursement even though the link presented adjacent channel interference.** First Order, Appendix A, at ¶ 16. The same policy should apply to all relocations. If the Commission's goal is to provide an incentive for relocation, then it should also include adjacent channel interference in the cost-sharing plan.

7. Finally, the Commission's decision to bar reimbursement for adjacent channel interference presents an anomaly vis-a-vis the unlicensed band clearinghouse, UTAM, Inc. ("UTAM"). In its plan submitted to the Commission and during public briefings, UTAM proposed to clear the estimated 10% of incumbents who are outside the unlicensed band but would experience co-channel or adjacent channel interference from the unlicensed PCS device. UTAM determined that it is important to clear those incumbents that are on adjacent channels. API believes the Commission should adopt a similar approach and enable those who relocate adjacent channel incumbents to benefit from the cost sharing plan.

B. Cost Estimates

8. The amended rules allow PCS licensees to gain access to microwave incumbents' facilities after the first year of the voluntary negotiation period so that an independent third party can estimate the cost and time needed to relocate the incumbent to comparable facilities. The PCS licensee is responsible for the costs of obtaining such an estimate. Because the one-year anniversary of the commencement of the voluntary period for A and B block PCS licensees has already passed, this provision is effective immediately. Order at ¶ 14.

9. The Commission's proposal to require independent cost estimates during the voluntary negotiation phase runs counter to the voluntary nature of this process. If incumbents are required to permit such estimates, it clearly should be during involuntary negotiations.

C. Sunset Provision

10. The Commission's decision that all microwave incumbents remaining in the frequency band 1850-1990 MHz lose their right to reimbursement either directly or via the clearinghouse on April 4, 2005 will provide a disincentive

for PCS licensees to pay to relocate microwave incumbents, particularly in later years and in rural areas. API believes that until a PCS licensee requires use of the spectrum and pays for relocation, the incumbent should retain both its primary status and its right to reimbursement. Otherwise, the Commission will create incentives for PCS licensees to delay rollout to rural areas and to forestall negotiations in subsequent years. The Commission's decision to deny incumbents reimbursement after April 4, 2005 also overlooks the fact that those incumbent systems will still be operational and that incumbents will still need to expend considerable sums of money to relocate to a reliable frequency band or other media.

D. Comparable Facilities

11. The Commission defined communications throughput as the amount of information transferred within the system in a given amount of time. During an involuntary relocation, PCS licensees will only be required to provide incumbents with enough throughput to satisfy incumbents' needs at the time of relocation; thus, PCS licensees need not match the overall capacity of the system. The capacity of the incumbent system, not the level of actual use at some point, is the crucial factor for true replacement. Under

the Commission's new rule, a microwave incumbent would be forced to accept a lower capacity system than if the definition were based on the capability of the incumbent's existing facilities.

12. API objects to this definition of throughput. No rational business would purchase a "bare minimum" system; any business that makes a significant and long-term investment in telecommunications equipment plans for the future by installing a system which will permit the business to grow into it, rather than a system which will become obsolete within a few months or years. The Commission reasoned that spectrum efficiency would be heightened by restricting throughput to existing use; this conclusion, however, is based on the incorrect premise that incumbents have only designed their systems for today's needs. The telecommunications needs of most incumbents continually expand, just as the American economy has historically expanded. Without adequate reserve capacity, replacement systems can become inadequate before installed. This necessitates a complete change-out of equipment. Under the Commission's plan, incumbents would be compelled to bear this excessive cost of future capacity even though they would have already paid for it once when the 2 GHz system was purchased. There appears to be no rational explanation

for limiting reimbursement to this inadequate and simplistic level.

E. Transaction Expenses

13. The Commission observed that incumbents are entitled to reimbursement under the amended rules for transaction expenses, such as attorneys' and consultants' fees, that are directly attributable to an involuntary relocation; however, the Commission adopted a proposal by Central Iowa Power Cooperative to place a cap of two percent of the total "hard" costs involved (e.g., costs of equipment, new towers and site acquisition). Order at ¶ 42. API points out that engineering consultants and transactional legal fees may reasonably cost $5,000 per link for a small system in a rural area, but they might reasonably exceed $10,000 per link in more urban areas. Other factors may increase these transaction costs. Thus, incumbents could face a potential deficiency in the reimbursement of reasonable transaction costs.

14. The Commission also determined that, once an involuntary relocation has been initiated, PCS licensees will not be required to pay for transaction expenses incurred by incumbents during the voluntary and mandatory

negotiation periods. Order at ¶ 43. API requests the Commission to reconsider the effect of this decision to forbid reimbursement of such transaction costs. In those instances when an agreement is not reached during the voluntary and mandatory negotiation periods, the Commission's decision lays the blame and cost for the failure to reach an agreement squarely upon the incumbent. API submits that it is equally plausible that the incumbent was willing to cooperate but the PCS entity was unwilling; the Commission should not relieve the PCS entity of its obligation to reimburse incumbents for the transaction costs involved with negotiating and relocating. But for the PCS licensee, the transaction costs would not have been incurred by the incumbent. API urges the Commission to permit reimbursement of an incumbent's reasonable transaction costs, regardless of when relocation occurs.

F. One Year Trial Period

15. The Commission previously established a twelve-month trial period for relocated incumbents to ensure that their new facilities were truly comparable to their former facilities. The amended rules "clarify" that the twelve-month trial period applies only where an incumbent has been relocated involuntarily. Accordingly, if the parties wish

to institute a trial period for relocations that occur during the voluntary or mandatory negotiation stage, the amended rules instruct that the parties must provide for such a period in the relocation contract.

16. API urges the Commission to apply this new stance proactively. While API is unaware of any individual occurrences, it is likely that agreements have already been reached in which the parties did not contractually reserve their right to the one-year trial period because they believed the FCC's rules guaranteed such a trial period. Retroactive application of the Commission's amended rule could deprive parties of the intended effects of their agreements.

G. Costs of Operating on a Transitional Basis

17. Many incumbents will incur costs from operating on a transitional basis during the conversion to new facilities. These costs could include expenses for leasing temporary commercial systems or costs of constructing and operating temporary facilities for use on an interim basis while the transition process occurs.

18. Because the costs of operating on a transitional basis will be significant, API submits that the cost sharing price cap should be adjusted. The Commission permits adjustment of the cap in those instances when a new tower must be constructed. Similarly, transition costs will be in addition to the costs for comparable replacement facilities and will be incurred regardless of whether the relocation is an early relocation or a later relocation. In fact, the Commission stated in its Order that:

> [O]ur rules protect microwave operations by requiring PCS licensees to provide incumbents with a seamless transition from their old facilities to the replacement facilities. Thus, if providing a seamless transition requires it, PCS licensees must relocate additional links **or pay for additional costs associated with integrating the new links into the old system . . . to preserve the system's overall integrity**.

Order at ¶ 37 (emphasis added).

19. Because the transition costs of a "seamless transition" are to be paid by a PCS licensee where applicable, those costs should be added to the reimbursement cap. Specifically, the $250,000 per link reimbursement cap for PCS licensees should be extended to include reasonable transition costs. API suggests that, where appropriate, the Commission add to the reimbursement cap an amount not to

exceed $50,000 per link in order to compensate PCS licensees (and possibly self-relocating incumbents) for transition costs when incurred and when reasonable. In addition, the Commission should encourage the PCS licensee to judiciously expedite the cutover if the PCS licensee is responsible for replacement of equipment. If the Commission determines that the PCS licensee is not expediting the cutover in order to keep total transition costs below $50,000, the PCS licensee should be forced to pay any excess transition costs.

II. CONCLUSION

20. API supports the Commission's decision to permit cost sharing because it will promote relocation of entire systems, or large portions thereof. By avoiding wholesale revision of existing rules, the Commission further vindicates those who relied upon the existing rules in the past and who continue to look to the Commission to protect their rights in the future. API believes that, with a few clarifications and minor changes, the Commission's decision will serve a worthy purpose for both PCS licensees and microwave incumbents.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing

Comments and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

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Its Attorneys

Dated: July 12, 1996

EXHIBIT B

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing	)	
The Cost of Microwave Relocation	)	

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE AMERICAN PETROLEUM INSTITUTE

AMERICAN PETROLEUM INSTITUTE

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Dated: April 16, 1997

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SUMMARY

Although API strongly supports the Commission's recent decision to allow microwave incumbents who relocate their own facilities to obtain reimbursement through the cost-sharing plan, API believes that certain aspects of the new cost-sharing rules will not provide incumbents with adequate (or, in some cases, any) reimbursement of their relocation costs. The Commission's rules also fail, in certain significant respects, to treat self-relocating incumbents in the same manner as comparably-situated initial Personal Communications Service ("PCS") relocators.

To begin with, the Commission's exclusion from the cost-sharing plan of microwave incumbents who self-relocate prior to the effective date of the Commission's new rules would unfairly punish those incumbents who acted quickly to clear their spectrum in the reasonable expectation that they ultimately would be entitled to recover their relocation costs. Given that the Commission has permitted retrospective cost recovery by initial PCS relocators, the same rights should be extended to incumbent self-relocators. In addition, the Commission should amend its rules so as to allow participation in the cost-sharing plan by incumbents who convert to leased services, rather than relocating to

new microwave facilities. This measure would encourage the prompt clearing of 2 GHz spectrum, while providing incumbents with more flexibility to choose the type of replacement services that best meet their needs.

API also urges the Commission to reconsider its decision to depreciate the cost-sharing rights of self-relocating incumbents. Such incumbents are equivalent in all relevant respects to PCS licensees who have relocated links entirely outside their licensed service areas and frequency blocks: i.e., they had no obligation under the Commission's rules to relocate the links for which they are seeking recovery under the cost-sharing plan. As the cost-sharing rights of such PCS licensees are not subject to depreciation, the same should be true of the cost-sharing rights of self-relocating incumbents.

Finally, API asks the Commission to clarify that when the cost-sharing formula is applied to self-relocating microwave incumbents, the variable "N" in the formula should equal 1 for the first PCS licensee that is determined to have a cost-sharing obligation to the incumbent, 2 for the second such PCS licensee, and so on. Otherwise, the potential recovery of incumbents through cost-sharing would

be dramatically and inappropriately reduced, thereby deterring them from initiating self-relocations.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	WT Docket No. 95-157
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The Cost of Microwave Relocation	)	

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits this Petition for Reconsideration and Clarification ("Petition") of certain rule amendments adopted by the Commission on February 13, 1997 in its Second Report and Order ("Second R&O") in the above-referenced proceeding.[1] Specifically, API urges the Commission to: (1) allow participation in the cost-sharing plan by microwave incumbents who relocated their own facilities prior to the adoption of the Second R&O or who self-relocate during the interim period between the adoption

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[1] 62 Fed. Reg. 12752 (March 18, 1997).

of the new rules and their effective date; (2) permit recovery under the cost-sharing plan by self-relocating incumbents who select leased services in lieu of replacement microwave facilities; (3) reconsider its decision to depreciate the amount of reimbursement that self-relocating microwave incumbents are entitled to receive under the cost-sharing formula; and (4) clarify that when the cost-sharing formula is applied to self-relocating microwave incumbents, the variable "N" in the formula should be assigned the value of 1 for the first PCS licensee that has a cost-sharing obligation to the incumbent.

I. PRELIMINARY STATEMENT

1. API is a national trade association representing approximately 300 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing and transportation of petroleum, petroleum products and natural gas. API's Telecommunications Committee is supported and sustained by licensees that are authorized by the Commission to operate, among other telecommunications systems, point-to-point and point-to-multipoint facilities in the Private Operational-Fixed Microwave Service ("POFS").

2. Accordingly, the Committee has participated in all of the Commission's major rule making proceedings addressing private microwave use of the spectrum, including nearly every phase of the Commission's Docket Nos. 90-314 and 92-9, which led to the adoption of reaccommodation provisions for those POFS licensees required to vacate their assignments to make way for PCS providers. API also has been actively involved in the above-captioned proceeding to establish a cost-sharing mechanism to allocate more fairly the costs of relocating microwave incumbents to alternative spectrum.

II. PETITION FOR RECONSIDERATION AND CLARIFICATION

3. The American Petroleum Institute ("API") applauds the Commission's decision to allow microwave incumbents who relocate their own microwave links to obtain reimbursement from subsequent Personal Communications Service ("PCS") licensees who benefit from the clearing of the spectrum. As API noted in its Comments in support of this proposal, participation by self-relocating incumbents in the Commission's PCS cost-sharing plan will provide for a more equitable distribution of relocation costs, encourage system-wide relocation of incumbent microwave systems and, as a result, foster the prompt deployment of PCS.

4. Several aspects of the Commission's decision, however, threaten to undermine the attainment of these worthy goals. In particular, and as further described below, if the Commission were to apply the cost-sharing plan to self-relocating incumbents in the manner contemplated by the Second R&O, many of these incumbents would receive inadequate compensation. In fact, some would receive no compensation whatsoever. Such a result would be directly at odds with the Commission's commitment to ensuring that incumbents receive full reimbursement for relocation to comparable facilities and could, therefore, actually serve to discourage self-relocation. The Commission's approach also violates basic precepts of fairness in that it fails, in certain respects, to treat self-relocating incumbents and similarly-situated PCS relocators in an evenhanded manner. Accordingly, API submits this Petition to request that the Commission fine-tune its cost-sharing rules so as to rectify these deficiencies.

A. Microwave Incumbents Who Complete Self-Relocation Before the Commission's New Rules Take Effect Should be Allowed to Participate in Cost-Sharing

5. The new rules adopted by the Commission to implement its Second R&O provide that for a self-relocating incumbent to be eligible for reimbursement under the cost-

sharing plan, it must submit documentation of the relocation to the clearinghouse within ten business days of the date that relocation occurs. 47 C.F.R. § 22.245(a). Neither the Commission's amended rules nor the Second R&O addresses whether incumbents who complete self-relocation more than ten days before the new rules were adopted and/or will take effect may participate in the cost-sharing plan.[2/] Such incumbents would include those who, for example, executed relocation agreements with A or B Block PCS licensees during the early stages of the voluntary negotiation period for some, but not all, of the links in their systems and self-relocated the links operating in the remaining PCS blocks in order to achieve system-wide relocations.

6. API believes that the exclusion from the cost-sharing plan of such self-relocating incumbents would be both illogical and unfair. In short, it would have the anomalous result of punishing those microwave incumbents who are, at least arguably, most worthy of reimbursement, i.e., incumbents who quickly and voluntarily cleared their

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[2/] The Commission also has not specified how the date of relocation is to be determined for purposes of calculating the deadline for microwave incumbents to submit their documentation to the cost-sharing clearinghouse. For instance, is it the date that the subject microwave links are decommissioned, the date that the replacement facilities are fully implemented, or perhaps some other date? API asks the Commission for clarification on this question.

spectrum to make way for PCS. Due to their laudable efforts to expedite and facilitate the relocation process, these self-relocators will be placed in a worse position than other microwave incumbents. Had they instead deferred relocation until the Commission officially declared them eligible for cost-sharing or even waited to be relocated by a PCS licensee, they would have been entitled to reimbursement. There is no reason why such incumbents should be required to bear all of the costs associated with their replacement facilities.

7. Moreover, the exclusion of early self-relocating incumbents from the cost-sharing plan would be flatly inconsistent with the Commission's treatment of PCS relocators. When the Commission adopted the cost-sharing plan for PCS licensees in April 1996, it concluded that "PCS licensees who have already relocated microwave links should receive the same reimbursement benefit as those PCS licensees who relocate microwave systems after adoption of the cost-sharing plan." First Report and Order, WT Docket No. 95-157 (April 25, 1996) (hereinafter, "First R&O"), at Appendix A, ¶ 23. Accordingly, the Commission's cost-sharing rules provide that a PCS relocator may obtain reimbursement for all relocation expenses incurred since April 5, 1995 (the date that the voluntary negotiation

period began for A and B Block PCS licensees). 47 C.F.R. § 24.245(b).

8. To ensure equitable treatment and fair compensation, self-relocating incumbents also should be entitled to reimbursement for all relocation expenses incurred since April 5, 1995.[3/] This temporal limitation would preclude recovery by microwave incumbents whose self-relocations preceded or were unrelated to the reallocation of the 1850-1990 MHz ("2 GHz") band to PCS, while allowing reimbursement to those incumbents who are subject to displacement.

B. Self-Relocating Microwave Incumbents Who Convert to Leased Services Should be Eligible for Compensation Under the Cost-Sharing Plan.

9. In lieu of building and operating new facilities, some microwave incumbents subject to the Commission's relocation rules have opted to replace their 2 GHz facilities with services leased from commercial providers.

[3/] At the very least, recovery should be permitted for expenses incurred since April 25, 1996 -- the date that the Commission initially proposed to allow self-relocating incumbents to participate in the cost-sharing plan. Since that time, some incumbents may have relocated their own systems in the reasonable expectation that the Commission's proposal ultimately would be adopted and, as in the context of PCS relocators, applied retrospectively.

Some of these incumbents voluntarily have initiated this transition (or "self-relocated") to leased services, rather than waiting to reach agreement with a PCS licensee. Because reimbursement under the cost-sharing plan is limited to the actual costs of relocating to "comparable facilities," such incumbents apparently are ineligible to participate in cost-sharing.

10. API believes that incumbents who "self-relocate" to leased services should be eligible for reimbursement under the cost-sharing plan. Otherwise, it will be in the interests of such incumbents to delay relocation until an appropriate reimbursement agreement is reached with a PCS provider. By allowing these incumbents to participate in cost-sharing, the Commission would not only be encouraging the prompt clearing of 2 GHz spectrum for PCS, but also would be making it more feasible for incumbents to choose the service that meets their future requirements.[4/]

[4/] The amount of reimbursement to be received by incumbents who convert to leased services could be determined in a number of ways. For instance, it could be based on a calculation of the net present value of the incumbent's lease payments through the "sunset" date of April 5, 2005, subject to the $250,000 reimbursement cap. Alternatively, an approximation of what it would have cost to relocate to comparable facilities could be employed.

C. The Cost-Sharing Rights of Self-Relocating Incumbents Should Not be Subject to Depreciation.

11. API argued in its Comments that the amount of reimbursement that a self-relocating incumbent is entitled to receive under the cost-sharing formula should not be reduced over time. As API pointed out, this depreciation policy makes sense in the context of a PCS licensee who relocates a link which is in its service area or frequency block, as such a PCS relocator directly benefits from the relocation. However, the Commission has recognized that:

> when a PCS provider relocates a link wholly outside its service area and/or spectrum block -- which would entitle it to full reimbursement of compensable costs up to the cap -- . . . such reimbursement should not be depreciated under the cost-sharing plan.

First R&O, at Appendix A, ¶ 17 (emphasis added). Similarly, because microwave incumbents are entitled to full reimbursement of their relocation costs, their recovery under the cost-sharing plan should not be subject to depreciation.

12. Notwithstanding the foregoing, the Commission concludes in its Second R&O that "the cost-sharing formula, when applied to microwave incumbents, should include

depreciation." Second R&O, at ¶ 27. In support of this decision, the Commission contends that: (1) a microwave incumbent who voluntarily relocates itself may obtain benefits it would not realize if it waited to be relocated by a PCS licensee (e.g., more control over the relocation process and reduced uncertainty); and (2) depreciation creates an incentive for the relocator to minimize costs.

13. Significantly, however, the Commission fails to explain why it has chosen to treat incumbent self-relocators differently from PCS providers who relocate non-interfering links. Indeed, the rationales offered by the Commission for depreciating the reimbursement rights of self-relocating incumbents apply equally well to PCS providers who relocate links wholly outside their service areas or spectrum blocks: these PCS providers benefit from the relocation of non-interfering links (for example, through the prompt execution of relocation agreements by microwave incumbents), and depreciation would create an incentive for them to minimize relocation payments. Nonetheless, the Commission has determined that such PCS relocators are entitled to full reimbursement and that depreciating their compensation would provide them with an incentive simply to wait "in the hope that other PCS entities will relocate these links." First R&O, at Appendix A, ¶ 17.

14. The Commission's failure to apply this same basic logic to self-relocating incumbents is unjustifiable. The reimbursement cap of $250,000 per link and the requirement that self-relocators provide an independent third-party appraisal of their relocation costs already create more than an adequate incentive for these incumbents to control their costs. Depreciating the cost-sharing rights of microwave incumbents will serve only to: (1) deny incumbents their rightful recovery and; (2) strip away the incentive of incumbents to self-relocate, thereby defeating the very purpose of allowing them to participate in the cost-sharing plan.

D. The Variable "N" in the Cost-Sharing Formula Should Equal One for the First PCS Licensee that Would Have Interfered with the Self-Relocated Link

15. As a final matter, API strongly urges the Commission to clarify that when it determined that the cost-sharing rights of self-relocating incumbents under the cost-sharing plan would be subject to depreciation, it was referring to depreciation through the variable "T_m" in the cost-sharing formula, rather than the variable "N." The variable "T_m" serves to reduce the amount of reimbursement owed by a subsequent-entrant PCS licensee for each month that passes before the PCS licensee opts to deploy its

system. Before this depreciation factor is applied, however, the total costs of relocation are divided by "N," which is defined as "the number of PCS licensees that would have interfered with the link." 47 C.F.R. § 24.243(c). Accordingly, this variable should be assigned a value of 1 for the first PCS licensee that is determined to owe reimbursement to a self-relocating microwave incumbent (rather than a value of 2, as in the application of the formula to an initial PCS relocator), a value of 2 for the second PCS licensee, and so on. Otherwise, the maximum reimbursement that an incumbent ever could receive under the cost-sharing plan from the first (and perhaps, only) interfering PCS licensee would be one-half of its relocation costs. Such a result would make a mockery of the basic right of microwave incumbents to receive full compensation for their relocation costs and likely would deter all potential microwave self-relocations.

III. CONCLUSION

16. The Commission's decision to allow self-relocating microwave incumbents to obtain reimbursement through cost-sharing will not be beneficial to either incumbents or PCS licensees unless incumbents are provided with adequate incentive to self-relocate. The exclusion from the cost-

sharing plan of incumbents who convert to leased services and the depreciation of incumbents' reimbursement would deter, rather than encourage, self-relocation in many instances. Additionally, the Commission should rectify its cost-sharing policies regarding depreciation and the recovery of costs incurred prior to the effective date of the cost-sharing rules to ensure that self-relocating incumbents are treated in the same manner as similarly-situated PCS relocators.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing Petition for Reconsideration and Clarification and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

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